RECORD AND BRIEFS

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# In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,
PETITIONERS

*v.*

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR DISCOVER FINANCIAL SERVICES AS *AMICUS CURIAE* IN SUPPORT OF OF PETITIONERS

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## QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring *cardholder* customers together with *merchant* customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar *merchant* customers from steering *cardholder* customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show *not just* that the provisions had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

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## INTEREST OF *AMICUS CURIAE*[*]

Discover Financial Services operates the Discover payment network and, along with certain affiliates and third parties, issues Discover-branded payment cards to consumers. As detailed in the District Court's opinion, (*E.g.*, Pet. App. 70a-86a), Discover competes directly with Respondents American Express Company and American Express Travel Related Services (collectively "Amex") on both sides of the "two-sided" (merchant-cardholder) platform described in the decision below. (Pet. App. 39a-40a.) Discover competes with Amex, Visa, and MasterCard in selling network services to merchants and acquiring banks. (Pet. App. 70a, 117a.) And Discover competes with Amex and numerous Visa and MasterCard affiliated banks in issuing payment cards to cardholders. (*Id.*)

Discover has a direct interest in this action because the opinion below reinstates Amex network rules—known as "nondiscriminatory provisions" or "NDPs"—that preclude merchants from steering transaction volume to Discover in exchange for lower merchant fees on Discover-branded card payments. (*E.g.*, Pet. 8; Pet. App. 100a-101a, 203a-207a.) As the District Court found, the removal of the NDPs would result in Discover aggressively competing on both sides of the two-sided platform by offering lower fees to merchants and robust rewards to cardholders. (Pet. App. 219a-220a.)

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[*] Pursuant to Rule 37.2(a), Discover provided timely notice of its intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than Discover, has made a monetary contribution to the preparation or submission of this brief.

## STATEMENT

The panel opinion reverses a trial judgment in the government's favor on grounds that break from settled antitrust precedents and threaten competition in a host of multi-billion dollar industries. Discover submits this brief to elaborate undisturbed aspects of the trial record that make this case an especially strong and timely vehicle for addressing these consequential departures from federal antitrust law.

The opinion below resolves Amex's appeal of trial findings that "Amex unreasonably restrained trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, by entering into agreements containing nondiscriminatory provisions ("NDPs") barring merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them." (Pet. App. 4a.) Petitioners and other government plaintiffs initially brought this enforcement action challenging Visa and MasterCard NDPs as well as the Amex provisions addressed in the panel opinion. (Pet. App. 66a.) Visa and MasterCard resolved the claims against them in a 2012 consent decree, but Amex continued to litigate. (Pet. App. 66a-67a.) Discover—the only new network to enter the payment card industry in decades, (Pet. App. 154a)—testified as a government witness about the anticompetitive effect of the challenged Amex rules on network competition. (Pet. App. 154a, 203a-207a, 212a-214a, 219a-220a.)

After a seven-week bench trial, the District Court issued a 150-page opinion holding that Amex's NDPs unreasonably restrained trade in the U.S. General

Purpose Credit Card ("GPCC") market, *i.e.*, the market in which Amex competes with Visa, MasterCard, and Discover to provide payment network services to merchants and banks. (Pet. App. 69a-71a.) Specifically, the District Court found that Amex's NDPs actually and "adversely affected competition" among the networks, (Pet. App. 148a)—notably by precluding Discover from reaping a "competitive reward for offering merchants lower swipe fees"—and "thereby suppress[ed] an important avenue of horizontal interbrand competition." (*E.g.*, Pet. App. 197a (internal quotation marks and citations omitted).) The trial judgment relied on scores of unrefuted facts supporting this conclusion, (Pet. App. 100a-101a, 196a-197a, 203a-212a), and expressly found that "the failure of Discover's low-price value proposition is emblematic of the harm done to the competitive process by Amex's rules against merchant steering." (Pet. App. 206a.) The District Court further found that these anticompetitive effects were not justified by the NDPs' benefits to cardholders, (Pet. App. 71a, 229a; see also *id.* 228a-258a), and thus held that the rules could not be enforced consistent with the Sherman Act. (Pet. App. 71a, 259a.)

The Second Circuit reversed and ordered judgment in Amex's favor. (Pet. App. 54a.) Specifically, the panel held that the District Court erred as a matter of law in defining the relevant product market as the market for network services to merchants and banks, rather than as the market for network services to merchants, banks, *and cardholders*. (Pet. App. 31a-40a.) Citing this new market definition, the panel held that the government's trial evidence could not prove "net" anticompetitive effects across both "sides" (merchant and cardholder) of Amex's "two-

sided platform." (Pet. App. 49a-53a.) The panel thus reinstated the NDPs that Amex admits preclude merchants from steering business to networks that offer merchants more competitive prices and services. (Pet. App. 100a-101a (citing Amex trial testimony on the ways in which the NDPs "block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept"); (Pet. App. 197a ("American Express itself recognizes the absence of competition on the basis of merchant pricing in the network services market.").)

## SUMMARY OF ARGUMENT

The opinion below breaks from controlling law in several respects. First, it departs from settled precedents defining antitrust product markets as comprising only goods or services that are reasonably interchangeable to the consumers whose choices are restrained by the allegedly anticompetitive practice. Second, it departs from precedents from this Court and other circuits on appellate treatment of trial findings. Third, the panel's unprecedented approach to market definition and the trial record violates the Sherman Act's central tenet by protecting a particular competitor (Amex) over an undisputed form of price competition. (See, *e.g.*, Pet. App. 100a; 197a.)

Although the text of the Sherman Act prohibits "[e]very contract * * * in restraint of [interstate] trade or commerce," 15 U.S.C. § 1, this Court has construed the statute to "prohibit only *unreasonable* restraints of trade." *E.g.*, *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (emphasis added). Market definition is critical to as-

sessing whether a challenged restraint is unreasonable because its competitive impact depends on the availability of substitutes for the products or services it allegedly restrains. Accordingly, this Court has long held that the "relevant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 481-482 (1992), and is defined by "products that have reasonable interchangeability" with it. *Id.* at 482 (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)).

The panel opinion purports to acknowledge these settled principles. (Pet. App. 32a.) But it goes on to abandon them (and create a conflict with precedents from this Court and others) in holding that an antitrust product market includes any product or service whose price or output is allegedly "affect[ed]" by the price or output of the product or service allegedly restrained. (Pet. App. 39a); (Pet. 18-24.) As the District Court observed, there is "no authority" for defining an antitrust product market to match an antitrust defendant's chosen business model. (Pet. App. 119a-120a.) Indeed, the Second Circuit itself has (until now) agreed with this Court that "[t]he relevant market is defined as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Geneva Pharm. Tech. Corp.* v. *Barr Labs. Inc.*, 386 F.3d 485, 506 (2d Cir.2004) (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). The panel opinion cannot be reconciled with these precedents.

The opinion also cannot be reconciled with the tri-

al record. Although the panel opinion concedes that market definition is a "deeply fact-intensive" exercise, (Pet. App. 32a), it is not supported by any findings that the services Amex provides to cardholders are "interchangeab[le]" with the services it provides to merchants. *E.g.*, *Kodak*, 504 U.S. at 482. That is no surprise, because the District Court found exactly the opposite under controlling law. (See Pet. App. 114a-122a, 127a); see also, *e.g.*, *Kodak*, 504 U.S. at 482; *Geneva Pharm.*, 386 F.3d at 497 (defining relevant market by reference to "distinct customer group[s]" with different price sensitivities).

These points are critical, because they highlight the panel opinion's departure not only from controlling law on antitrust market definition, but also from this Court's precedents on appellate treatment of trial findings. This Court has long held that where, as here, an appellate panel identifies no clear error in such findings, it "'may not reverse'" simply because it "'would have weighed the evidence differently.'" *Amadeo* v. *Zant*, 486 U.S. 214, 223, 228 (1988) (quoting *Anderson* v. *Bessemer City, N.C.*, 470 U.S. 564, 573-574 (1985)) (reversing circuit court for "engag[ing] in impermissible appellate factfinding"). Yet that is what the panel opinion does.

As detailed below, Discover operates the same type of two-sided (merchant-cardholder) platform that Amex operates. (See Pet. App. 70a, 86a.) The panel opinion does not dispute this, or disturb the trial findings that the services these and other card networks provide to merchants are *not* "interchangeable" with the services they provide to cardholders. (*E.g.*, Pet. App. 111a; 117a-120a, 127a); (see also *id.* 203a-207a, 219a (respecting this distinction while recognizing the "symbiotic relationship" between the

two "sides" of Amex's network platform). The panel opinion simply substitutes a "necessarily affects" test on product pricing for this Court's interchangeability standard for market definition, (Pet. App. 39a), and disregards large portions of the trial record in order to protect Amex's model of competing with Visa and MasterCard. (See, *e.g.*, Pet. App. 48a-49a & n.51 (expressing concerning that the "relief sought by the government in this case could * * * increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit").) Ironically, the result is a controlling circuit opinion that uses "rule of reason" analysis to do exactly what this Court has held such analysis should not: namely, treat "competition itself [a]s unreasonable." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 696 (1978). Review is warranted because the panel decision threatens competition in the payment card industry and other multi-billion markets that increasingly employ two-sided business platforms, (Pet. 20-25), and because the trial record here—including and particularly the undisturbed findings regarding Discover—make this case a strong and timely vehicle for addressing the question presented.

## REASONS FOR GRANTING THE WRIT

### I. The Panel Opinion Conflicts With Precedents from This Court and Other Circuits.

The panel opinion purports to apply controlling law to the "evidence presented at trial." (Pet. App. 52a.) But its analysis departs starkly from this Court's precedents and circuit law on market definition and appellate treatment of trial findings.

As noted, this Court has long held that the "rele-

vant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Kodak*, 504 U.S. at 481-482, and is therefore defined by "products that have reasonable interchangeability" with it. *Id.* (quoting *Du Pont*, 351 U.S., at 404); (see also Pet. 19-21 (citing authorities).) The panel opinion pays lip service to these standards in stating that the relevant market is comprised of "all products '*reasonably interchangeable* by consumers for the *same purposes*,'" (Pet. App. 32a (emphasis added; internal quotation marks and citations omitted)), and in acknowledging that "market definition is a deeply fact-intensive inquiry," (*id.*). But its analysis rejects these controlling principles in holding that the relevant market for assessing the NDPs' anticompetitive impact includes not only network services to merchants, but also services to cardholders. (See Pet. App. 39a-40a, 49a-50a.)

The panel justified its unprecedented approach to market definition on the grounds that Amex competes with Visa and MasterCard by operating a "two-sided" platform that generates network revenue from both groups of customers. (Pet. App. 16a, 39a-40a, 50a-51a.) But this Court has never held that a defendant's decision to provide services to two distinct groups of consumers should define the product market relevant to alleged Sherman Act violations. Indeed, this Court has expressly *rejected* such arguments. (*See* Pet. 20-25 (citing authorities).) The reason is simple. Interchangeability requires similar products or services as well as similar customer needs and preferences. See, *e.g.*, *F.T.C.* v. *Lundbeck, Inc.*, 650 F.3d 1236, 1239-1243 (8th Cir. 2011) (applying this Court's precedents to define relevant product market by reference to the "reasonable interchangea-

bility" of products and affirming trial court finding that two pharmaceutical drugs were *not* reasonably interchangeable even though FDA classified them as therapeutically equivalent); *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 198-200 (3d Cir. 1992) (same where evidence supported trial finding that resilient floor covering in issue was *not* reasonably interchangeable with other types of floor coverings). That is exactly the analysis the District Court correctly applied here. (See Pet. App. 111a, 117a-120a, 127a.)

The District Court found that although "merchants and their customers jointly make the decision of which method of payment is used for any given transaction, the customer neither sees nor pays the additional cost when networks increase the price of network services to merchants (other than in the form of higher retail prices, which are paid by all consumers)." (Pet. App. 127a.) Accordingly, the "relevant consumer for purposes of assessing price sensitivity in the proposed market and for identifying reasonably interchangeable substitute products is the merchant." (*Id.*)

The panel opinion's contrary conclusion cannot be squared with controlling law or the trial record. The undisturbed trial findings concerning Discover, (Pet. 8)—which again operates the same type of "two-sided" network Amex does, (Pet. App. 23a)—illustrate why. Discover entered the payment card industry in 1985, (Pet. App. 154a), with "breakthrough value propositions" on both "sides" of the market the panel opinion describes, (*id.* 203a.) "Cardholders could receive the first GPCC card with rewards feature at no annual fee." (*Id.*) And merchants had access to "a low-price alternative to the existing GPCC networks"

that "pric[ed] its network services 'very aggressively' * * * setting all-in discount rates significantly below those of its competitors." (Pet. App. 203a-204a.) These "value propositions" reflected a competitive strategy to gain market share by setting merchant "rates significantly below" those of other networks while still offering robust rewards to cardholders. (*Id.*)

This strategy was part of a "'major campaign'" to "help[]" merchants "control payment costs" by steering to Discover. (Pet. App. 204a.) Discover announced this campaign in 1999 in a speech before a trade industry group, and implemented it through a wide variety of merchant outreach initiatives. (Pet. App. 204a-205a.) These efforts included sending letters "to every merchant on its network" to alert them of the other networks' price hikes and encouraging them "to save money by shifting volume to Discover," and also included offering other merchants *additional* discounts from Discover's "already lower prices if [the merchants] would steer customers to Discover." (*Id.* 204a.) Discover recommended that the merchants use "point-of-sale signage" to effectuate the steering and recommended that the merchants pass on their steering-based savings to customers. (*Id.* 204a-205a.)

These and other practices that Amex admits its NDPs preclude, (see Pet. App. 100a-101a), are paradigmatic examples of the kind of price competition the Sherman Act protects. See, *e.g.*, *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") But the NDPs prohibit them. (*Id.*) Discover learned from merchant interviews that the "merchant restrictions

imposed by the other payment networks denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network."[1] (*Id.*) And the District Court expressly found that Amex's NDPs precluded Discover—a "significant competitor in [the GPCC] market," (Pet. App. 86a)—from engaging in precisely the "two-sided" (merchant and cardholder) platform competition the panel opinion cites as central to the antitrust inquiry here. (*E.g.*, Pet. App. 39a-40a; 67a; 203a-207a.)

Notably, the District Court found that Amex's NDPs "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." (Pet. App. 203a.) In support of this finding, the District Court cited unrefuted trial evidence that Discover's attempt in the 1990s to compete with other networks by offering merchants lower fees and better service failed, (Pet. App. 203a-207a), because the NDPs "denied merchants the ability to * * * steer share to Discover's lower-priced network" in exchange for such benefits, (Pet. App. 205a).

These findings were more than sufficient to affirm the trial judgment under market definition precedents from this Court and multiple circuits. Accordingly the panel was forced to break from these decisions to justify its contrary conclusion. The consequences of this undeniable split from settled law are grave. Left undisturbed, the panel opinion's ap-

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[1] Although the District Court noted that Discover's efforts were thwarted by the combination of Visa's, MasterCard's, and Amex's anti-steering restraints, it also found that Amex's rules *alone* would have prevented Discover from steering. (Pet. App. 206a-207a n.43) (emphasis added).

proach to market definition—which the panel found sufficient to disregard the clear and undisturbed trial findings here—could be cited in defense of virtually any anticompetitive conduct as long as the defendant could say it "necessarily affects" prices or other benefits to a related but distinct group of consumers. (Pet. App. 39a.)

The panel opinion purports to downplay the gravity of this new and unprincipled approach to market definition on the ground that it is necessary to account for the "feedback effect" between the two "sides" of the platform Amex operates to compete with Visa and MasterCard. (*E.g.*, Pet. App. 39a (holding that the district court erred in "declin[ing] to define the relevant product market to encompass the entire multi-sided platform" because "the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)".) But this assertion simply underscores the need for review, because the District Court expressly recognized the "two-sided nature of" Amex's platform in its "antitrust analysis." (Pet. App. 79a; see also *id.* 80a-84a, 111a-112a, 117a-120a, 125a-128a, 197a, 203a-207a.) It simply (and rightly) found that the NDPs' anticompetitive effects on the merchant "side" of the platform were *not* excused by the benefits they provide Amex cardholders. (Pet. App. 117a-120a, 125a-128a, 203a-207a.)

In support of this conclusion, the District Court cited trial evidence and findings that the services Amex and other networks provide to merchants and cardholders are "distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consum-

ers." (Pet. App. 119a.) It then cited precedents from this Court and others in concluding that there is "no authority * * * that requires the court to define the relevant product market to encompass the entire multi-sided platform" that Amex chose to adopt as a business model. (Pet. App. 119a-120a (citing *Times–Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 610 (1953)).

The panel opinion does not address, much less respect, these precedents or findings, (Pet. 21-23 (citing authorities)), all of which support the District Court's conclusion that it is "not necessary that the relevant product market be defined by reference to how American Express chooses to compete in the industry." (Pet. App. 118a.) In reaching this conclusion, the District Court amply addressed the panel's concern with the "feedback" effects of two-sided business platforms. (*E.g.*, Pet. App. 126a.) The District Court considered extensive fact and expert evidence on these effects, (see, *e.g.*, Pet. App. at 118a-120a, 229a-250a), and ultimately concluded that the NDPs resulted in higher prices for both the merchant *and* cardholder "sides" of Amex's platform. (Pet. App. 207a-212a.) The reason, the District Court explained, is that the NDPs enable Amex to charge higher merchant fees "without fear of other networks undercutting their prices," (*id.* 210a), and merchants "pass most, if not all, of their additional costs along to their customers in the form of higher retail prices," (*id.* 210a-211a).

In making these findings, the District Court carefully considered the NDPs' benefits to Amex cardholders. It merely found those benefits limited and insufficient to justify the rules' anticompetitive effects on merchants, because all consumers pay the high retail prices that result from the high merchant

fees, but not all consumers are premium Amex members who receive its cardholder rewards. (Pet. App. 211a-212a.) Based on this and other trial evidence, the District Court found that removal of Amex's NDPs would: (i) "restor[e] downward competitive pressure on merchant prices" that would benefit the merchant "side" of Amex's platform," (Pet. App. 217a-218a); *and* (ii) would *also* "benefit consumers" while protecting cardholder choice, (*id.* at 219a-220a).

The panel opinion does not disturb—or even acknowledge—these findings or the extensive and Discover-specific evidence supporting them. (See Pet. App. 4a-54a, 206a-207a, 219a.) Accordingly, the opinion would warrant review as a departure from settled law even if the relevant antitrust market could be defined as including both "sides" of Amex's network platform. See, *e.g.*, *Amadeo*, 486 U.S. at 223, 228-229 (holding that, absent a finding of clear error, an appellate court may not ignore or reweigh factual findings to reverse a trial judgment); *Anderson*, 470 U.S. at 574-575 (emphasizing trial court "expertise" in fact finding); *Foster* v. *Dalton*, 71 F.3d 52, 55 (1st Cir. 1995) (affirming the district court's trial findings even though the panel would have weighted the evidence differently); *Scandia Down Corp.* v. *Euroquilt, Inc.*, 772 F.2d 1423, 1427-29 (7th Cir. 1985) (rejecting invitation to reweigh the trial evidence and affirming the district court's factual findings).

Here, the trial record, "viewed in its entirety," plainly "permits" the conclusion, *Anderson*, 470 U.S. at 573-574, that the NDPs have a "net" anticompetitive effect in the market for "network services to merchants," (Pet. App. 23a), which is the only product market consistent with this Court's precedents and the record below, (see *id.* 20-25). Further, and criti-

cally, the record permits the same conclusion even if the market is defined to include *both* the merchant and consumer sides of the network platform the panel opinion describes. (Pet. App. 39a-40a; 79a, 83a, 86a, 100a-101a, 191a-258a.) Left undisturbed, the panel's contrary conclusions could be invoked to shield anti-competitive conduct in any number of industries from proper antitrust scrutiny by further muddying an area of law that demands "'clear rules,'" (Pet. 16 (quoting *Pac. Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009)), and exacerbating the already "notoriously high litigation costs and unpredictable results" of antitrust litigation under the "rule of reason." (Pet. 16 (quoting *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (citation omitted).) Review is warranted for these reasons alone.

## II. The Decision Below Departs from the Sherman Act's Central Tenet.

The panel opinion's departure from the law and record is particularly troubling because it sanctions precisely the type of policy judgment the Sherman Act forbids. The decision amounts to a determination that protecting Amex's "unique" method of competing with Visa and MasterCard, (Pet. App. 87a), is more important than allowing Discover's low-price version or, for that matter, any inter-network price competition on merchant network fees at all. (*Id.* 39a-40a, 49a-53a.) In upholding a "restraint that effectively blocks interbrand competition on price" because Amex says it could compete better without price pressure, (Pet. App. 235a), the panel opinion endorses exactly the "frontal assault on the basic policy of the Sherman Act" this Court has admonished against. *E.g.*, *Prof'l Eng'rs*, 435 U.S. at 695; (Pet. App. 235a,

240a-241a).

As this Court has explained, the Sherman Act does not authorize courts to draw lines between "good" competition and "bad" competition, but rather reflects a "legislative judgment that ultimately [all forms of] competition will produce not only lower prices, but also better goods and services." *F.T.C.* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (quoting *Prof'l Eng'rs*, 435 U.S. at 695). Any line-drawing among types of competition is a task reserved for Congress. *See United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."). And to date its judgment has been to protect "'*competition*, not *competitors*.'" *Atl. Richfield*, 495 U.S. at 338 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320, (1962) (emphasis in original) (explaining that "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share") (citation omitted)).

The panel opinion disregards this fundamental principle in holding that the NDPs and Amex business model they protect are more important than price competition, including the form of price competition offered by Discover that the District Court expressly recognized in its factual findings. (Pet. App. 203a-207a, 219a); (Pet. 8, 33.) As the District Court's opinion illustrates, such a stark departure from this Court's precedents is *not* necessary to ensure proper consideration of antitrust challenges involving two-

sided business platforms.

As noted, the trial record directly links the NDPs' destruction of Discover's low-cost merchant pricing initiative to harm on both the merchant *and* cardholder "sides" of Amex's platform. For example, the District Court found that the NDPs forced Discover to "abandon[]" its low-price campaign to merchants because, as Discover's President, Roger Hochschild, testified: giving the merchants a "discount without getting anything in return didn't make business sense" for Discover. (Pet. App. 206a.) The District Court then went on to find that this restraint on merchant choice harms cardholders, because "inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices." (*E.g.*, Pet. App. 193a; see also *id.* 210a-211a.)

Based on these and other aspects of the trial record, the District Court found the failure of Discover's low-price campaign "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." (Pet. App. 206a.) And it found that enjoining the NDPs would redress this harm by allowing Discover or other networks "aggressively [to] pursue a strategy of lowering [their merchant] prices" in exchange for volume while still robustly competing for cardholders through rewards and steering benefits. (Pet. App. 219a-220a.) Such competition, in turn, would result in a boon to consumers in form of more rewards and lower prices. (*Id.*)

For all of these reasons, the District Court did not "err[]" in "declin[ing] to define the relevant product market to encompass the entire multi-sided platform." (Pet. App. 39a (internal quotation marks and

citation omitted).) It simply (and correctly) recognized that the merchant "side" of the platform constitutes a distinct product market under this Court's precedents and those of other circuits, (Pet. App. 114a-122a), and left it to competition (rather than the courts or Amex's NDPs) to decide the "optimal mix of revenue as between the two sides." 2017 Supplement, 5E P. Areeda & H. Hovenkamp, Antitrust Law ¶ 562e (4th ed. 2016). That is what the Sherman Act contemplates, and what the panel opinion disregards in conflict with the statute and this Court's decisions applying it.

## III. This Case Is a Strong and Timely Vehicle for Reviewing Issues of Exceptional Importance to Multiple Industries.

The reach and impact of the panel's decision is not confined to this case or the NDPs it challenges. As the Petition notes, "two-sided" business models are increasingly ubiquitous. (See Pet. i.) The panel opinion's significance outside the payment card industry is detailed in the Petition. (Pet. 25-35.) But the threat it poses to competition within the payment card industry alone merits attention.

The Second Circuit is home to a longstanding multi-district litigation challenging various Visa and MasterCard rules and fees, including anti-steering rules analogous to the Amex NDPs the panel reinstated below. Last year Visa and MasterCard negotiated—but the Second Circuit disapproved—a $7 billion settlement of various MDL claims that would have immunized a host of network rules from future antitrust challenges. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 231-240 (2d Cir. 2016), *cert. denied sub nom.*

*Photos Etc. Corp.* v. *Home Depot U.S.A., Inc.*, 137 S. Ct. 1374 (2017). On remand two putative nationwide merchant classes assert, among other things, that:

> Because of the Anti-Steering Restraints [the panel opinion upheld below], a Credit or Debit-Card Network that charges [lower] Merchant-Discount Fees * * * will not be able to make inroads on the monopoly positions of Visa and MasterCard. While * * * competitors such as Discover stand ready, willing, and able to compete with the Defendants by offering lower fees to Merchants, the Defendants' rules prevent and restrain any such competition by ensuring that increased efficiency and lower prices will not lead to increased market share for competitors * * * *

*In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 1:05-MD-1720-MB-JO, Dkt. No. 6923, Proposed Amended MDL Damages Complaint ¶ 188 (E.D.N.Y.); *see also id.*, Dkt. No. 6910, Proposed Amended MDL Injunctive Compl. ¶ 157 (similar).

Absent review, the panel opinion will threaten proper antitrust analysis of these and related claims within the Second Circuit. Like the Amex NDPs the panel reinstated below, many of the Visa and MasterCard rules challenged in these pending actions could be cast as restraining network competition over merchant fees or services in order to protect or benefit cardholders. Accordingly—and perversely—the panel's decision to break from the law and record to protect rules the panel perceived as central to Amex's ability to compete with Visa and MasterCard, (see,

*e.g.*, Pet. App. 48a-49a n.51), could end up being used to defend a host of Visa and MasterCard rules from antitrust challenges going forward.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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